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ABSTRACT

This paper argues that the United States Supreme Court's 1978 "FCC v. Pacifica Foundation" decision, in which the Court held that broadcasters must refrain from transmitting unseemly language at a time of day when children are most likely to be in the audience, has created a perilous dilemma for broadcasters: how to accommodate a child's right not to know without violating the adult's right to know. To capture the gravity of this dilemma, the paper focuses on a television documentary, "Scared Straight," that liberally used profanity, and contends that there is no principled way to distinguish between the language that resulted in the "Pacifica" decision and that used in the television documentary unless the Federal Communications Commission (FCC) uses content criteria. The paper presents a brief history of the events leading to the "Pacifica" decision and then examines the FCC's interpretation of this decision. It then focuses on "Scared Straight," emphasizing the FCC's reasons for not finding the program's language indecent. In conclusion, the paper speculates on the implications of "Pacifica" for both broadcasters and the FCC. (FL)

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CHILDREN, INDECENCY, AND THE PERILS OF BROADCASTING: THE CASE OF "SCARED STRAIGHT"

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CHILDREN, INDECENCY, AND THE PERILS OF
BROADCASTING: THE CASE OF "SCARED STRAIGHT"

It has long been acknowledged by the judiciary that children deserve special protection from pornography; their "right to know" can and has been Constitutionally proscribed. While "minors are entitled to a significant measure of First Amendment protection," as the Supreme Court ruled in Tinker v. Des Moines Community School District,[1] society's interest in protecting children from abusive, offensive or otherwise objectionable expression may justify "more stringent controls on communicative material available to youths than on those available to adults."[2] As a matter of law, Emerson reminds us, the "world of children is not the same as the world of adults, so far as a guarantee of untrammeled freedom of mind is concerned."[3] Or as Justice Stewart reasoned in Ginsberg v. New York, children may be subject to separate Constitutional standards because often they do not possess the "full capacity for individual choice which is the presupposition of First Amendment guarantees."[4]

Thus the Supreme Court's 1978 decision in FCC v. Pacifica Foundation might appear to be reasonably consistent with established doctrine: given the "pervasive presence" of broadcast media and especially their unique accessibility to children, the Court held, broadcasters have a special responsibility to avoid unseemly and generally inappropriate language at a time of day when children are likely to be in the audience.[5] Upon closer examination, however, the Pacifica Court's "protect-the-children" rationale for regulating indecent broadcasts not only contravenes the First Amendment in ways heretofore rejected by the Court but, more importantly, involves government entanglement with the content of protected speech that may end

in repression of broadcast programming. In terms of First Amendment jurisprudence, the Court in Pacifica creates a troublesome and perilous dilemma for broadcasters: how can the licensee accommodate a child's right not to know without violating an adult listener's right to know?

In an effort to capture the gravity of the dilemma created by the Pacifica Court, this study focuses on a recent television documentary, "Scared Straight." Our thesis, simply, is that there is no principled way to distinguish between the language used by George Carlin on WBAI-FM, which the Court in Pacifica defined as indecent, and the language used throughout "Scared Straight" unless the Federal Communications Commission uses content criteria. In support of this conclusion, we offer at the outset a brief history of the Pacifica decision, followed by an examination of the FCC's interpretation and application of Pacifica. We then focus on "Scared Straight," with an emphasis on the FCC's reasons for not finding the documentary's language indecent. In the concluding section we speculate on the implications of Pacifica for both broadcasters and the FCC.

The Nature of Indecency

In late 1973, the FCC received a complaint about George Carlin's "Filthy Words" monologue, a 12 minute satire aired by WBAI-FM, Pacifica Foundation's non-commercial station in New York City, as part of a regularly scheduled program on society's attitudes toward language.[6] In response to an FCC inquiry, Pacifica described Carlin as a "significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl"; the monologue itself, Pacifica argued, was "an incisive satirical view of the subject under discussion."[7]

While defending the need to maintain the broadcaster's broad discretion in the area of programming, and fully aware of its own prohibition against censoring or interfering with a broadcaster's free speech rights,[8] the Commission sought to enforce the statutory prohibition against "obscene, indecent, or profane" broadcasts.[9] In a Declaratory Order adopted and released in early 1975, the FCC granted the complaint but declined to impose any sanctions on WBAI. Instead, the Commission intended to use its Order as a "flexible procedural device" to "clarify the standards which the Commission utilizes to judge 'indecent language'."[10]

In its appeal to the District of Columbia Court of Appeals, Pacifica argued that the prohibition against "obscene, indecent, or profane" broadcasts is unconstitutionally vague unless "indecent" is subsumed under "obscene." Since Carlin's monologue, in Pacifica's view, neither appealed to prurient interest nor lacked literary and political value, its broadcast of the monologue should be protected under the standards established by the Supreme Court in Miller v. California.[11] In essence the Court of Appeals agreed and subsequently reversed the Commission's Order. Specifically, the Court found the FCC's Order in violation of its duty to avoid censorship. "In promulgating the Order, the Court reasoned, "the Commission has ignored both the statute which forbids it to censor radio communications and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee."[12]

The Supreme Court, however, ruled in favor of the FCC and established the constitutionality of the Commission's power to regulate--though not ban--inoecent programming. In response to the Commission's petition for certiorari, the Court (1) found Carlin's monologue indecent as broadcast, (2) ruled that the FCC's Order was not in violation of Section 326 of the Communications Act, and (3) concluded that the Commission's authority to

impose sanctions on licensees who engage in indecent broadcasting does not run counter to the First Amendment.[13] Dismissing Pacifica's contention that Carlin's monologue was not indecent because it did not appeal to prurient interests, the Court argued that "obscene, indecent, and profane" are used in the disjunctive: each word, Justice Stevens explained, has a separate meaning.[14] Using Webster's Dictionary, the Court defined indecent as unseemly and inappropriate; indecent language can be identified simply by its "nonconformance with accepted standards of morality."[15]

In its attempt to protect the listener's right not to be exposed to unwanted, unexpected, and potentially offensive programming, the Court endorsed the FCC's remedy of "channeling" objectionable language to a time of day when, presumably, it would lose its indecent attributes. Whereas an obscene broadcast would be obscene by virtue of its content, an indecent broadcast would be indecent--to use Commissioner Robinson's phrase--for reasons more atmospheric than substantive.[16] Or as Justice Stevens explained, " Words that are commonplace in one setting are shocking in another."[17] To identify an indecent program, therefore, the FCC must assess a host of variables bearing on context and circumstance; metaphorically, the Commission must decide for itself whether a "pig has entered the parlor."

The Supreme Court's "Pig in the Parlor" test thus accommodates the FCC's desire to channel--as opposed to prohibit--indecent language.[19] And the Commission's desire to channel indecent language rests, in turn, on a concern for the intrusive nature of broadcasting, particularly its accessibility to, and impact on, children.

Broadcasting and Children

Unlike obscenities, indecencies both lack the element of appeal to prurient interest and cannot be redeemed as having literacy, artistic, political or scientific value when children are in the audience. Indeed, the very concept of indecent, as the FCC defines it, is

> . . . intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious gutter language describing these matters has the effect of debasing and brutalizing human beings, and we believe such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.[20]

Thus even at the risk of reducing the "adult population to hearing or viewing only that which is fit for children" by channeling objectionable language away from adults "with normal sleeping habits,"[21] the Pacifica Court sought to protect children from intrusive programming by requiring broadcasters to avoid "offensive" language at "inappropriate" times.

Inevitably, however, Pacifica not only limits an adult listener's access to diverse programming but restricts as well parental discretion and autonomy. "As surprising as it may be to individual Members of this Court," Justice Brennan complained in his dissenting opinion, "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."[22] In

contrast to several earlier decisions, where the Court held that state interference with parental discretion would be tolerated only in the event of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare" or of "a potential for significant social burdens,"[23] the Pacifica Court encourages the state, through the FCC, to decide what expressions are fit for children.

What Pacifica appears to establish, therefore, is a special relationship between broadcasting and children, a relationship on which the Court and the Commission, regrettably, declined to comment with any precision or conceptual clarity. Consequently, the Court imposed no principled limit on the relationship between children and broadcasting as a "basis for FCC censorship."[24]

Post Pacifica Confusion

Beyond its narrow ruling on the authority of the FCC to channel indecent language, the Pacifica Court made no effort to confront the larger issue of intrusion by expression. To be sure, the narrowness of the Court's decision in Pacifica did little to alleviate what Emerson describes as general confusion surrounding the type of balance sought by the Court in cases involving conflicts between intrusive expressions and privacy claims.[25] As we pointed out elsewhere, the Pacifica Court contributed "little to an understanding of when, in theory or practice, statutory protection of privacy from nongovernmental intrusion by expression satisfies the demands of the First Amendment."[26]

Just as the Pacifica Court evaded the broader issue of intrusion by expression, it did little to operationalize the very terms it used to define indecency. Specifically, the Court left unanswered three crucial questions. First, who qualifies as a child? Should the indecency standard

be limited to children under fourteen, the age at which children are believed to "approach the moral and intellectual maturity of an adult"?[27] Or should children be defined as twelve and under, a definition used by the FCC in its policy statement on children's programs?[28] As the Court of Appeals wondered, "Need a nineteen year old and a seven year old be protected from the same offensive language"?[29] The second question focuses on how many children should be protected. Are the Court and the Commission concerned with protecting all children or only substantial numbers of children? If the indecency standard loses its force when children in the audience are "reduced to a minimum,"[30] what constitutes "minimum"?[31] Finally, since the Court endorses a policy of channeling offensive language away from children, what time of day--or night--would be acceptable for something like Carlin's monologue? The available evidence (see Table I) suggests that children--especially teenagers--are watching television at virtually any hour of the day or night.

Tabel I Here

Moreover, children above the age of six typically prefer primetime television; as the FCC itself acknowledged in 1979, "children spend more hours per day watching adult programs than children's programs."[32] Thus at what time is there not a "reasonable risk that children may be in the audience"?[33] In the end, as Justice Stevens observed, "whether broadcast audiences in the late evening contain so few children that playing [Carlin's] monologue would be permissible is an issue neither the Commission nor this Court has decided."[34]

Notwithstanding its responsbility and authority to enforce 18 U.S.C. 1464--the statutory prohibition against obscene, indecent, and profane broadcasts--the FCC has contrued Pacifica in its most narrow terms. For example, in response to a petition to deny a renewal of a license to Boston's

TABLE I

THE THREE MOST POPULAR VIEWING TIMES FOR CHILDREN

M-F, 8-11 p.m.				
S, 7-11 p.m.	19%	31%	38%	35%
M-F, 4:30-7:30 p.m.	21%	21%	15%	18%
M-F, 10 a.m.-4:30 p.m.	20%	10%	7%	16%
Children's Ages	2-5	6-11	M F (12-17)	

Source: Nielsen's National Audience Demographics Report
November 1980

WGBH-TV, a noncommercial educational station, the Commission made it clear that Pacifica afforded "no general perogative to intervene in any case where words similar or identical to those in Pacifica are broadcast over a licensed radio or television station."[35] In a Memorandum Opinion and Order adopted and released in July 1978--only a few days following the Pacifica decision--the FCC declined to impose sanctions on WGBH because the station's use of an occasional expletive did not constitute the kind of "verbal shock treatment" with which the Commission and the Court were concerned in Pacifica. "It was certainly not our intent, even in our Pacifica ruling," the FCC explained, "to inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts."[36]

Underscoring the exceptional nature of the Commission's response to WBAI's broadcast of George Carlin's "filthy words" monologue, FCC Chairman Charles Ferris, in a speech to the New England Broadcasters Association, reassured broadcasters that the FCC would intervene only if the factual situation in Pacifica "were virtually recreated." And, Ferris was convinced, that was "about as likely to occur again as Halley's Comet."[37]

The FCC and the Case of "Scared Straight"

Within a year of Ferris' "Halley's Comet" speech, Golden West Television's "Scared Straight," an award-winning[38] documentary about an experimental Juvenile Awareness Program at Rahway (New Jersey) State Prison, made its debut in well over 100 markets. Narrated by Peter Falk, the documentary dealt with a unique approach to crime-prevention: expose chronic juvenile offenders to the harsh and seedy life of the penitentiary. As described in a full page ad in TV Guide, "Juvenile delinquents come face to face with real convicts for a shocking exposure to prison life. A bold attempt to

scare youthful offenders into going straight."[39]

In striking contrast to WBAI's broadcast of Carlin's monologue, which brought only one complaint to the FCC, "Scared Straight" resulted in "between 100 and 150 complaints over a period of several months."[40] The language used throughout "Scared Straight" was so raw and vulgar that Newsweek expressly assumed that the Commission had granted the show "a rare exemption from censorship policies."[41] But Newsweek was wrong. The FCC neither previewed the show nor exempted it from FCC rules and regulations.[42] In response to the many complaints it received, the Commission simply declined to impose sanctions on any of the participating stations. Curiously, the FCC did not find "Scared Straight" indecent as broadcast.

Verbal Shock Treatment

By an reasonable interpretation of Pacifica, the language used throughout "Scared Straight" was indecent. In fact, the documentary's very vehicle was the kind of "verbal shock treatment" to which the Supreme Court referred when it ruled that Carlin's monologue was indecent. The documentary's crude, graphic, and explicit language was virtually identical to the language used by Carlin in "Filthy Words."[43] Clearly, both Carlin and the convicts employed a vocabulary intended to "shock" the listener; both used offensive language repeatedly and deliberately.

The Commission, however, was impressed by the "strong warning" aired prior to "Scared Straight"[44] and, presumably, by the "word of caution" Falk offered early in the program: "there's simply no way to edit out certain words and descriptions and still preserve the true impact of the program. In fact the whole point of this program would be lost by censoring what we filmed." For WBAI, on the other hand, a similar warning apparently had little effect on the audience because, in the Supreme Court's view, "the broadcast

audience is constantly tuning in and out":

> prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[45]

If there appears to be little difference in the language used by Carlin in his monologue and the language used by the convicts in "Scared Straight," and if both programs began by warning the audience about possibly offensive language, then perhaps the presence of children in the audience emerges as the controlling factor.

Children in the Audience

According to Arthur L. Ginsburg, then chief of the Complaints and Compliance Division of the FCC's Broadcast Bureau, "since the broadcast of 'Scared Straight' was during the late evening hours, although there was no guarantee that there would be no children in the audience, the number of children in the audience presumably would be reduced to a minimum."[46] Ginsburg's reference to the "late evening hours" meant 10:00 p.m., the time "Scared Straight" was broadcast "in most parts of the country"; combined with the "strong warnings" preceding its broadcast, the FCC was thus willing to conclude that "the likelihood of exposure of substantial numbers of children to the program was diminished."[47] Although Ginsburg said that the "Commission had not defined what is considered 'substantial' numbers of children," it was nonetheless the Commission's position that "Scared Straight" did "not violate the law with respect to 'indecent' language."[48]

Notwithstanding Ginsburg's unsubstantiated claim that "Scared Straight"

was aired at 10:00 p.m. in most parts of the country, at least a dozen stations broadcast the program at 8:00 or 9:00 p.m. and at least one station broadcast it as early as 6:30 p.m. In any event, even 10:00 p.m. falls within "prime time" (Monday through Friday, 8-11 p.m.; Sunday, 7-11 p.m.), which is the most popular viewing time for children ages 6 to 17 (see Table I). Contrary to the FCC's belief that "children in the audience presumably would be reduced to a minimum," the times at which "Scared Straight" was broadcast were the very times when children do most of their television viewing.

Although, incredibly, the warning preceding the broadcast of "Scared Straight" cautioned viewers that the documentary was "not intended for children's viewing," Arnold Shapiro, the program's director and producer, reported that many of the 60 stations that first ran the program intended to rerun it at an earlier time, thus increasing its impact on children.[49] Moreover, "Scared Straight" was endorsed by the National Educational Association, thus insuring the program some legitimacy as an educational tool. If "Scared Straight" was not intended for children, it was surely programmed to reach an adolescent audience; and the FCC--as well as the Supreme Court--makes no distinction between a child and an adolescent.

Conservatively, tens of thousands of children--perhaps millions--watched "Scared Straight." In contrast, the FCC knew of only one teenager who listened to WBAI's broadcast of George Carlin's monologue. The presence of children in the audience, therefore, would not appear to be a basis for distinguishing between "Scared Straight" and "Filthy Words"; if anything, the children-in-the-audience argument is far more compelling in the case of "Scared Straight" than in Pacifica.

Children, Indecency, and the FCC

That the FCC did not find "Scared Straight" indecent as broadcast is hardly a victory for broadcasters or the First Amendment. On the contrary, the case of "Scared Straight" only serves to underscore the FCC's arbitrary and capricious enforcement of the statutory ban on obscene, indecent, and profane broadcasts. While the present Commission may maintain a narrow interpretation of Pacifica, Bragg's point is well taken: "what a Commission comprised of new members will subjectively find to be prohibited, although not obscene, is uncertain."[50] It is more than regrettable that the FCC offers no discernible explanation for why Carlin's monologue and "Scared Straight" should be treated differently under the law.

If the FCC stands unsure and unguided on the indecency question, it is partly because the Pacifica Court fails to present an operationally meaningful distinction between an indecency and an obscenity. Instead, what the Court in Pacifica offers is an unworkable "variable obscenity standard," an inept and pointless effort to shield children from otherwise protected speech. It is an inept decision if only because the Court seems to be oblivious to the fundamental differences between print media, where a variable obscenity standard can be made to work, and broadcast media, where a variable obscenity standard cannot be enforced without at the same time imposing restrictions on an adult's freedom of choice. And it is a pointless decision in light of the existence of technology designed to allow an adult to restrict a child's access to designated categories of radio or television programming.[51]

Broadcasters can take little comfort in the fact that the Pacifica Court emphasizes the narrowness of its holding; for as Tribe observes, the Court "did little to make the holding's limits apparent."[52] It would be

unfortunate, Tribe concludes, if the Court's construction of an indecency standard left "any enduring marks on First Amendment jurisprudence: Pacifica should be confined to its facts, and eventually discarded as a 'derelict in the stream of the law.'"[53] However, until the Court itself discards Pacifica, the FCC is invested with extraordinary discretion and unparalleled autonomy when it comes to deciding how and when privacy claims and the presence of children may be used to justify an abridgement of broadcasters' First Amendment rights. What this means, in practice, is that the Court in Pacifica seems to have abandoned its long-standing commitment to what Monaghan calls the principle of First Amendment due process: "that a judicial, rather than an administrative, determination of the character of speech is necessary."[54]

If indeed "courts alone are competent to decide whether speech is constitutionally protected,"[55] then administrative agencies should be limited to fact-finding. In light of both Pacifica and the FCC's unreasoned response to the broadcast of "Scared Straight," broadcasters can only hope that the Commission will abandon its role as impartial adjudicator and restrict its efforts to the construction of a record. To obviate the dangers of administrative censorship, and to safeguard First Amendment values, it is imperative that the FCC resist any temptation to assess the Constitutional dimensions of the very record it constructs.

[1]Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

[2]Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975).

[3]Thomas I. Emerson, The System of Freedom of Expression. New York: Random House, 1970, p. 496.

[4]390 U.S. 629, 649-650 (1968) (Stewart, J., concurring). In Ginsberg the Court upheld a New York obscenity statute which prohibited "the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." Ibid. at 631.

[5]FCC v. Pacifica Foundation, 438 U.S. 726, 3 Med. L. Rptr. 2553 (1978). For an examination of Pacifica, see Theodore L. Glasser and Harvey Jassem, "Indecent Broadcasts and the Listener's Right of Privacy," Journal of Broadcasting, 24 (Summer 1980): 285-299.

[6]The monologue was aired at 2:00 p.m. on October 20, 1973.

[7]Pacifica Foundation, 56 F.C.C. 2d 94, 96, 95 (1975) The "Filthy Words" monologue is from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005), Cut 5, Side 2. The "filthy words" include shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.

[8] §326 of the Communications Act of 1934 (Public Law 416, 73d Congress) prohibits the FCC from censoring or otherwise interfering with a broadcaster's right of free speech.

[9]18 U.S.C. § 1464 (1970) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[10]Pacifica Foundation, 56 F.C.C. 2d at 99.

[11]Under Miller v. California, 413 U.S. 15 (1973), material may be obscene if (i) an average person applying contemporary standards finds the work, taken as a whole, appeals to prurient interests, (ii) the word depicts or describes, in a patently offensive way, sexual or excretory conduct specifically defined by the applicable state law, and (iii) the work, taken as a whole, lacks serious literacy, artistic, political, or scientific value.

[12]Pacifica Foundation v. FCC, 2 Med. L. Rptr. 1465, 1467; 556 F.2d 9, 13 (D.C. Cir. 1977).

[13]FCC v. Pacifica Foundation, 3 Med. L. Rptr. 2553. See also Glasser and Jassem, p. 290.

[14]For a detailed discussion on the distinction between an indecency and an obscenity, see Susan Wing, "Morality and Broadcasting: FCC control of 'Indecent' Material Following Pacifica," Federal Communications Law Journal, 31 (Winter 1978): 156-162.

[15]3 Med. L. Rptr. at 2558.

[16]Pacifica Foundation, 56 F.C.C. 2d at 108.

[17]3 Med. L. Rptr. at 2561.

[18]"We simply hold," the Court concluded, "that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." 3 Med. L. Rptr. at 2562.

[19]The Court expressly assumed, arguendo, that Carlin's monologue would be protected in other contexts. 3 Med. L. Rptr. at 2561. Indeed, it would appear that Carlin's monologue would have been protected had it been broadcast at a time of day when few children were likely to be in the audience. 56 F.C.C. 2d at 98, 100, 108. See also Glasser and Jassem, p. 288.

[20]56 F.C.C. 2d at 98.

[21]Pacifica Foundation v. FCC, 2 Med. L. Rptr. at 1471, 1479.

[22]FCC v. Pacifica Foundation, 3 Med. L. Rptr. at 2570 (Brennan, J., dissenting)

[23]Wisconsin v. Yoder, 406 U.S. 205, 230, 234 (1972). See also Butler v. Michigan, 352 U.S. 380 (1957), where the Court held that restricting the distribution of offensive material to children must not violate the rights of adults to receive material they wish to see or hear. Other relevant cases include Prince v. Massachusetts, 321 U.S. 158 (1944), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923), and Ginsberg v. New York, 390 U.S. 629 (1968). For discussion, see Robert Wolff, "Pacifica's Seven Dirty Words: A Sliding Scale of the First Amendment," University of Illinois Law Forum, No. 4 (1979): 998-1000. See also Dabney Elizabeth Bragg, "Regulation of Programming Content to Protect Children After Pacifica," Vanderbilt Law Review, 32 (1979): 1386-1391.

[24]3 Med. L. Rptr. at 2571 (Brennan, J., dissenting).

[25]Emerson, p. 559.

[26]Glasser and Jassem, p. 296.

[27]Bragg, p. 1393, citing Wisconsin v. Yoder, 406 U.S. 205, 245 at n. 3.

[28]Federal Communications Commission, Television Programming for Children: A Report of the Children's Television Task Force, Vol. III (October 1979), pp. 4-5. See also the FCC's "Report and Policy Statement on Children's Television," Federal Register, November 6, 1974, p. 39396.

[29]Pacifica Foundation v. FCC, 2 Med. L. Rptr. 1465, 1470 (D.C. Cir. 1977).

[30]Pacifica Foundation, 56 FCC 2d 94, 98 (1975).

[31]It is also worth noting that because the FCC's channeling strategy merely mandates that indecent language "be broadcast at a time of day when there are fewer children in the audience, the plan fails to protect all children." Thus, Bragg concludes, by settling for less than a total ban on indecent language, "the Pacifica Court unnecessarily abridged first amendment principles without achieving the goal that purportedly justified such abridgment." See Bragg, p. 1397.

[32]FCC, Television Programming for Children, Vol. I (October 1979), p. 37.

[33]56 FCC 2d at 98.

[34]3 Med. L. Rptr. at 2562, n. 28.

[35]69 FCC 2d 1250, 1254.

[36]Ibid. at 1255.

[37]"Which way the wind blows at the FCC after WBAI," Broadcasting, July 24, 1978, p. 31.

[38]"Scared Straight" was selected by the Academy of Motion Pictures Arts and Sciences as the Best Documentary Feature of 1978.

[39]TV Guide (Southern New England Edition), May 17, 1979, p. A-97.

[40]Letter from Arthur L. Ginsburg, chief of the Complaints and Compliance Division of the FCC's Broadcast Bureau, to Theodore L. Glasser, November 1, 1979.

[41]"Telling It Like It Is," Newsweek, April 23, 1979, p. 101.

[42]Ginsburg letter, November 1, 1979.

[43]Three of Carlin's most controversial "filthy words"--"fuck," "motherfucker," and "shit"--were used repeatedly in "Scared Straight."

[44]Letter from Arthur L. Ginsburg to Theodore L. Glasser, July 3, 1979.

[45]3 Med. L. Rptr. at 2562.

[46]Ginsburg letter, November 1, 1979.

[47]Ginsburg letter, July 3, 1979.

[48]Ginsburg letter, November 1, 1979.

[49]Newsweek, April 23, 1979, p. 101.

[50]Bragg, p. 1417.

[51]See Walter S. Baer, Controlling Unwanted Communications to the Home. Santa Monica, CA: Rand Corp., 1978.

[52]Lawrence Tribe, American Constitutional Law. Mineola, N.Y.: Foundation Press, 1979, p. 67.

[53]Ibid., pp. 67-68.

[54]Henry P. Monaghan, "First Amendment 'Due Process,'" Harvard Law Review, 83 (January 1970): 520. See Manual Enterprises v. Day, 370 U.S. 478 (1962), where the Supreme Court first established the doctrine of First Amendment due process, and Freedman v. Maryland, 380 U.S. 51 (1965), where the Court emphasized the institutional importance of the judiciary in protecting First Amendment interests. For discussion, see Monaghan, pp. 520-524.

[55]Ibid.